VERMONT ENVIRONMENTAL BOARD
'10 V.S.A. §§ 6001-6092

Re: Commercial Airfield, Cornwall, Vermont
Declaratory Ruling #368

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for a declaratory ruling regarding whether the construction of certain improvements to an airfield and associated flight activities require a permit pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). As explained below, the Environmental Board concludes that an Act 250 permit was and is required.

I. BACKGROUND

On July 29, 1998, Edward V. Peet ("Petitioner") appealed from Jurisdictional Opinion #9-055 issued on June 30, 1998 ("Opinion") and petitioned for a declaratory ruling ("Petition"). The Opinion concludes that the construction of certain improvements to an airfield located on a 100 acre tract of land in Cornwall, Vermont, and associated flight activities ("Project"), requires an Act 250 permit.

On September 10, 1998, Marcy Harding, Chair of the Environmental Board, convened a preheating conference and, on September 14, 1998, issued a Prehearing Conference Report and Order ("Prehearing Order"). No party objected to the Prehearing Order.

On October 28, 1998, Ralph Teitscheid, a party in this Petition, filed a request pursuant to Environmental Board Rule ("EBR") 4 seeking the issuance of subpoenas for six individuals ("Subpoena Request").

On November 10, 1998, a hearing panel of the Environmental Board convened a hearing in this Petition with the following persons participating:

Edward Peet. Pro se
Agency of Transportation by Scott Whitted, Esq.

The hearing panel recessed this Petition at the conclusion of the hearing pending post-hearing filings by the parties. deliberation and issuance of a final decision in this Petition.

On November 24, 1998. the Petitioner filed a Memorandum of Law regarding federal peremption of Act 250 jurisdiction over the Project.

On November 24, 1998, the Agency of Transportation ("AOT") and the Agency of Natural Resources ("ANR") jointly filed a Memorandum of Law regarding federal preemption of Act 250 jurisdiction over the Project.

On December 24, 1998, the hearing panel issued a proposed decision to the parties. Pursuant to 10 V.S.A. § 6027(g) and EBR 41(A), parties were allowed to request oral argument before the Board, and to file written objections or legal memoranda in response to the proposed decision.

On January 11, 1999, the Petitioner filed a request for oral argument and a written objection to the proposed decision.

On January 27, 1999, the Board convened oral argument relative to the Petition with the Petitioner participating. The Board also convened a deliberation regarding the Petition. Following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete. This matter is now ready for final decision. To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, Docket No. 96-369, slip op. at 13 (1998); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

II. ISSUES

As stated in the Prehearing Order, the issues are as follows:

1. Whether the Project is a pre-existing development pursuant to 10 V.S.A. § 6081 and EBR 2(O).

2. Whether, if the Project is a pre-existing development, some or all of the Project constitutes a substantial change pursuant to 10 V.S.A. § 6081 and EBR 2(G) such that an Act 250 permit is required.

3. Whether some or all of the Project constitutes the construction of improvements for farming, logging or forestry purposes below the elevation of 2.500 feet such that some or all of the Project does not constitute development pursuant to 10 V.S.A. § 6001(3) and does not require an Act 250 permit.

4. Whether some or all of the Project constitutes development pursuant to 10 V.S.A. § 6001(3) and EBR 2(A) such that some or all of the Project requires an Act 250 permit.

5. Whether, if some or all of the Project does require an Act 250 permit, such jurisdiction is preempted under the supremacy clause of the United States Constitution.

III. FINDINGS OF FACT

1. The Project consists of the construction of certain improvements to an airfield located on a 100 acre tract of land in Cornwall, Vermont, and associated flight activities.

2. Edward Peet owns the "Peet Airport" in Cornwall, Vermont. The Peet Airport is located on the "Peet Farm." The Peet Farm exceeds 100 acres in size and is located below 2,500 feet in elevation. Mr. Peet has owned the Peet Farm since 1968.

3. Peet Airport is 1.4 miles east of the intersection of Route 30 and Peet Road. The Peet Airport is reached by Peet Road, which is a class 3 town highway. The Peet Airport has a single runway which is aligned in a north/south direction. The runway's approximate dimensions are 116 feet by 2,640 feet.

4. Before June 1, 1970, the runway's surface was dirt, with low spots and ruts filled in with sand or clay. There were no runway lights at the Peet Airport as of June 1, 1970.

5. Due to changes in the agricultural operations at the Peet Farm, Mr. Peet constructed a fence to the west of the runway through the combination of existing and newly constructed fences. This construction took place sometime between 1968 and 1976.

6. In 1976, Mr. Peet replaced the fence, constructed a water diversion ditch to the west of the runway, and installed a 150 foot culvert underneath the runway. The culvert is perpendicular to the runway.

7. In 1988, Mr. Peet replaced the 1976 culvert with the existing culvert. The existing culvert is shorter than the 1976 culvert.

8. During the late 1970s, Mr. Peet installed runway lights. The runway lights enhanced safety at the Peet Airport. During the 1980s. Mr. Peet installed a VASI light at the north end of the runway.

9. In the middle 1980s, Mr. Peet improved the runway's surface by laying down a layer of crushed stone on the northern two thirds of the runway to form a surface area that could be graded.

10. In the 1990s, Mr. Peet improved the runway's surface by laying down a layer of white crushed marble. In 1998, Mr. Peet laid down 7 dump truck loads of white crushed marble on the runway. The white crushed marble greatly eases runway maintenance.

11. Prior to June 1, 1970, Mr. Peet performed aircraft maintenance services for third persons in exchange for compensation at the Peet Airport using an existing farm building. In part, Mr. Peet constructed the Peet Airport so that people could fly their airplanes to him so that he could perform aircraft maintenance services. There is no evidence of the dimensions or location of the building from which Mr. Peet performed aircraft maintenance services, or the level of business activity which resulted from Mr. Peet's aircraft maintenance services.

12. Since 1973, Mr. Peet has held two authorizations issued by the Federal Aviation Administration ("FAA") certifying him as an airframe and power plant mechanic. In 1976, Mr. Peet obtained an FAA inspector license.

13. In the early 1990s, Mr. Peet constructed a single story, 55' by 60' building near the junction of the runway's north end and Peet Road ("Shop Building").

14. The Shop Building is used for agricultural purposes in connection with the Peet Farm and for commercial purposes in connection with the Peet Airport. Mr. Peet has and continues to perform aircraft maintenance services from the Shop Building for third persons in exchange for compensation.

15. Before June 1, 1970, the Peet Airport was used for aircraft flight operations_ that is, aircraft takeoffs and landings, by Mr. Peet, Dustair Inc. ("Dustair"), and other persons.

16 Before June 1. 1970. Dustair conducted commercial agricultural flight operations from the Peet Airport. Dustair's flight operations were provided to third persons in exchange for compensation. Dustair is no longer in existence.

17 There is no evidence of the total number of commercial agricultural flight operations which took place at the Peet Airport prior to June 1. 1970.

18. The pre-June 1, 1970 commercial agricultural flight operations were for the dispensing of seed and fertilizer on farm land. The preJune 1, 1970 commercial agricultural flight operations did not include the dispensing of pesticides.

19. Mr. Peet has no record of the total number of commercial agricultural flight operations which have taken place since June 1, 1970, although such flights have occurred and continue to occur. Mr. Peet has conducted commercial agricultural flight operations from the Peet Airport since June 1, 1970.

20. Since June 1, 1970, the number of commercial agricultural flight operations has varied, depending on the demand for such commercial services as influenced by the weather and the intensity level of insect and bug infestations.

21. Mr. Richard Quesnel/Dick Quesnel Inc. ("Quesnel") is a commercial agricultural aerial spraying company that services orchards and farms in Vermont. In 1996, Quesnel named Peet Airport as the base of operation for his flight operations.

22. On March 22, 1996, Robert L. McMullin, Aviation Administrator, State of Vermont Agency of Transportation ("AOT"), wrote to Mr. Peet and stated, in part, as follows:

> Dear Ed: [A] new development requires that we proceed with the action we discussed ... namely, initiating action to change the status of your "Restricted Landing Area for Personal Use" to "Restricted Landing Area" without the personal use restriction. Richard Quesnel has named "Peet Airport" as his base of operation for his aerial spray operation this year ... his permit is conditioned on receipt of an application for a change in status from you by May 1, 1996.

23. On April 1, 1996, Mr. Peet filed an application with AOT for the approval of an "Application to Establish a Restricted Aircraft Landing Site" (the " 1996 AOT Application"). The preprinted 1996 AOT Application contained the following language: "The site will be operated only for non-commercial purposes." Mr. Peet crossed-out the language on his 1996 AOT Application.

24. On April 25, 1997. Mr. Peet filed with AOT an "Application to Establish a Restricted Aircraft Landing Area, Helicopter Landing Area. or Ultralight Landing Area" (the " 1997 AOT Application").

25. In completing the 1997 AOT Application, Mr. Peet describes the commercial flying activity contemplated at the Peet Airport as follows:

> As a base of operation for air applications of products to be used for agricultural, silvicultural, public health; (sic) safety and welfare, mosquito control, fire suppression.

26. On August 26, 1997, AOT issued Order No. 97-l to Mr. Peet. AOT Order No. 97-l is a "Certificate of Approval Restricted Landing Area" (the "1997 AOT Certificate").

27. The 1997 AOT Certificate authorizes, in part, commercial use limited to one based aircraft for agricultural, silvicultural, and mosquito spraying, maximum 16 flights per day, between the dates of March 15 and August 30, engines not to be started prior to 6 AM or operated past 9 PM.

28. Until this year, Peet Airport was Quesnei's home base. In 1998, Quesnel conducted commercial agricultural flight operations from the Peet Airport over a three week period, Quesnel's flight operations were for the aerial spraying of pesticides and the dispensing of nitrogen fertilizer pellets.

29. The Peet Airport is the only airport in the Cornwall-Middlebury area from which aerial pesticide spraying flight operations can occur.

30. Pesticides are prohibited at Middlebury Airport because pesticides are a mixed product and the Middlebury water aquifer is underneath the Middlebury Airport. A pesticide spill at Middlebury Airport could have devastating consequences on Middlebury's water supply.

31. The commercial agricultural flight operations operated from the Peet Airport are done under the authority of Federal Aviation Regulation ("FAR") Part 137.

IV. CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof to show that a project is exempt from Act 250 is on the person claiming the exemption, in this case the Petitioner. Re: Weston Island Ventures. Declaratory Ruling #169 at 5 (June 3, 1985), citing Bluto v. Employment Security, 135 Vt. 205 (1977). The burden of proof consists of the burdens of production and

persuasion. Re: John Gross Sand and Gravel, Declaratory Ruling #280 at 9 (July 28, 1993); Re: Pratt's Proaane, Findings of Fact, Conclusions of Law and Order #3R0486-EB at 4-6 (Jan. 27, 1987).

B. De Novo

Pursuant to 10 V.S.A. § 6007(c) and EBR 3(D), a petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board. Although it may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether a jurisdictional opinion or project review sheet, or any part thereof, is correct. Thus, facts stated or conclusions drawn are not considered, by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or any rule or order of the Board over the project described in the jurisdictional opinion or project review sheet.

C. Subpoena Request

Under EBR 4, "[a] party not represented by a licensed attorney may submit a written request for a subpoena stating the reasons therefor and representing that reasonable efforts have been made to obtain voluntary compliance with its requests." The Board requires that the person requesting the subpoena state the reasons therefor because "[n]o subpoena should issue to secure testimony that is not material" Re: Interstate Uniform Services Corn., Declaratory Ruling #147, Memorandum of Decision at 2 (Mar. 5, 1984). Therefore, a subpoena will be issued only where a demonstration is made that the testimony sought is reasonably likely to be material. See Re: Putney Paper Comnany, Inc., #2W0436-7-EB, Memorandum of Decision at 6 (Apr. 26, 1995).

The Subpoena Request only partially complied with EBR 4. The Subpoena Request did represent that reasonable efforts were made to obtain voluntary compliance. However, the Subpoena Request failed to adequately state the reasons for the subpoenas. The Board has no basis with which to determine whether the Subpoena Request seeks testimony that is reasonably likely to be material to the issues before the Board. Accordingly. the Subpoena Request is denied.

D. Issues 1 and 2: Pre-existing Development and Substantial Change

The first and second issues in this Petition require the Board to determine whether there has been a substantial change to a pre-existing development. Before the Board determines whether there has been a substantial change, it must first ascertain whether

there is a preexisting development. If there is no pre-existing development, then the Board has no basis to determine whether there has been a substantial change to a pre-existing development. See Re: David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 11 (Dec. 23, 1996).

Act 250 requires that a land use permit be obtained prior to commencing construction on a development. 10 V.S.A. § 608 1 (a). "Development" is defined, in part, as a commercial project located on a tract of land of more than one or ten acres, depending on whether the town has permanent zoning and subdivision bylaws. 10 V.S.A. § 6001(3).

The requirement to obtain a permit does not apply to a "development which is not also a subdivision, which has been commenced prior to June 1, 1970, if the construction will be completed by March 1, 1971." 10 V.S.A. § 6081(b).

EBR 2(A)(5) provides in relevant part that a project is a development if it consists of "[a]ny construction of improvements which will be a substantial change of a pre-existing development ..."[1]

EBR 2(0) states:

> "Pre-existing development" shall mean any development in existence on June 1, 1970, and any development which was commenced before June 1, 1970 and completed by March 1, 1971.

The burden is upon Mr. Peet to provide complete information to the Board on the nature of the activity prior to June 1, 1970. See Re: Champlain Construction Co., Declaratory Ruling #214, Memorandum of Decision at 4 (Oct. 2, 1990). Since Act 250 regulates both the construction of improvements and the use of the improvements, Mr. Peet must establish (i) that the Peet Airport was in existence prior to June 1, 1970, and (ii) the extent of its use prior to June 1, 1970. See Re: Interstate Uniform Services, Declaratory Ruling #147, Findings of Fact. Conclusions of Law, and Order at 7 (Sept. 26. 1984). This conclusion is similar to the Board's conclusion that. in the context of an earth extraction project, an exemption from Act 250 jurisdiction depends upon

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'In 1985 the Legislature ratified the Board's rules such that they have "effectively become part of the Act 250 legislative scheme codified at chapter 151 of Title 10." In re Barlow, 160Vt. 513, 521 (1993); In re Spencer, 152 Vt. 330.336 (1989).

establishing both the existence of the earth extraction project and the extent of its use. See Re: John Gross Sand and Gravel, Declaratory Ruling #280, Findings of Fact, Conclusions of Law, and Order at 8 (July 28, 1993).[2]

The Board has found that, prior to June 1, 1970, (i) the Peet Airport was in existence; (ii) Dustair conducted commercial agricultural flight operations; and (iii) Mr. Peet performed aircraft maintenance services from an existing building. However, there is no evidence of(i) the total number of commercial agricultural flight operations which took place at the Peet Airport prior to June 1, 1970; (ii) the dimensions or location of the building from which Mr. Peet performed aircraft maintenance services; and (iii) the level of business activity which resulted from Mr. Peet's aircraft maintenance services. Mr. Peet has not met his burden of proof to establish that the Peet Airport, including flight operations and aircraft maintenance services, is exempt from Act 250 under 10 V.S.A. 608 1 (b) and EBR 2(O).

Accordingly, based on the findings of fact made herein, the Board is not persuaded that the Peet Airport, including the flight operations and aircraft maintenance services, constitutes a pre-existing development. Since the Peet Airport is not a pre-existing development, there can be no substantial change to the Peet Airport.

Even if the Peet Airport does constitute a pre-existing development, then the Board would conclude that there has been a substantial change such that an Act 2.50 permit would be required.

'The Board stated: "To maintain the exemption under 10 V.S.A. § 6081(b) and [EBR] 2(O), a gravel pit owner or operator claiming the exemption must not only assert that the gravel pit was in existence as of June 1, 1970 but also must prove what the pre-existing annual rate of extraction was." Id. Accord Re: Robert and Barbara Barlow, Declaratory Ruling #234, Findings of Fact, Conclusions of Law, and Order (Sept. 20, 1991), aff'd In re Barlow, 160 Vt. 513 (1993); Re: H.A. Manosh Corporation, Declaratory Ruling #164, Findings of Fact, Conclusions of Law, and Order (April 17, 1985), aff'd In re H.A. Manosh Corooration, 147 Vt. 367 (1986); Re: C.V. Landfill. Inc. and John F. Chapple, Application #5 W 11 SO-WFP (Unlined Landfill Facility), Findings of Fact, Conclusions of Law, and Order (Oct 15, 1996); and Re: Casella Waste Management, Inc., Declaratory Ruling #244, Findings of Fact, Conclusions of Law, and Order (Feb. 7, 1992). These cases involved whether changes to a pre-existing development's operation resulted in the forfeiture of the project's exemption from Act 250 as a pre-existing development.

Under past Board rulings, the question of substantial change has been defined as a two-stage inquiry. First, the board evaluates whether there has been or will be a cognizable change to the pre-existing development. Second, the board determines whether the change has the potential for significant impact with respect to one or more of the Act 250 criteria. Re: L.W. Haynes, Declaratory Ruling #192 at 7 (Sept. 5, 1987). With respect to identifying the potential for significant impacts, the Board has stated that the question is not whether the impacts will occur, but whether they may occur. Barlow, supra, at 11.

Based on the findings of fact, the following has occurred since June 1, 1970: (i) construction of the water diversion ditch and culvert; (ii) installation of runway lights and VASI light; (iii) application of crushed stone and marble on the runway's surface; (iv) construction of the Shop Building; and (v) agricultural flight operations for the spraying of pesticides. These activities would constitute a cognizable change to the Peet Airport as it existed on June 1, 1970. The Board concludes that these cognizable changes would have the potential for significant impacts under 10 V.S.A. § 6086(a)(1)(air and water pollution), (1)(B)(waste disposal), (4)(soil erosion), and (8) (aesthetics) and, accordingly, would constitute a substantial change. Therefore, an Act 250 permit would be required for the continued use and operation of the Peet Airport, including flight operations and aircraft maintenance services, had Mr. Peet established that the Peet Airport was a pre-existing development.

E.

Act 250 requires that a land use permit be obtained prior to commencing construction on a development or prior to commencement of development. 10 V.S.A. §
§ 6001(3), the word "development" shal
"construction for farming, logging or forestry purposes below the elevation of 2500 feet."
See § 6001(22).[3]

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3 § 6001(22) "Farming"

crops; (B)
(D) the
(E)
produced on a farm; -on-site production of fuel or power from

In construing Act 250, the Board's goal is to effect the intent of the legislature. See Bisson v. Ward, 160 Vt. 343,348 (1993). The Board presumes that the legislature intended the plain meaning of the statutory language. Id. If the meaning of the statute is plain on its face, the Board enforces the statute according to its express terms. E.g., Braun v. Board of Dental Examiners, No. 96-105, slip op. at 5 (Vt. Sept. 5, 1997); Russell v. Armitage, 166 Vt. 392,403 (1997); Re: Vermont Egg Farms. Inc., Declaratory Ruling #3 17 at 8 (June 14, 1996).

The construction of improvements which has occurred at the Peet Airport since June 1, 1970 has been, at least in part, for the provision of commercial agricultural flight operations and aircraft maintenance services. The construction and use of these improvements is not exempt from the definition of development as farming, logging or forestry. Accordingly, an Act 250 permit is required since Mr. Peet has constructed improvements for a commercial purpose at the Peet Airport since June 1, 1970.

F. Issue 4: Development Pursuant to 10 V.S.A. § 6001(3) and EBR 2(A)

Act 250 jurisdiction extends only to those land uses which constitute "development." Development is defined, in part, as the "construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes." 10 V.S.A. § 6001(3).

The Board's rules also define development, in part, as the "construction of improvements for any commercial or industrial purpose, including commercial dwellings, which is located on a tract or tracts of land of more than one acre owned or controlled by a person." EBR 2(A)(2). If a municipality has adopted both permanent zoning and subdivision bylaws, then jurisdiction attaches only if the involved land is more than ten acres. Under EBR 2(D), "Construction of improvements" means "any physical action on a project site which initiates development." There is no de minimis exception in Act 250, the EBRs, or Board precedent even where the activity already taken and proposed to occur does not involve significant physical disturbance. Re: Roger Loomis d/b/a Green Mountain Archery Range and Richard H. Sheldon, # 1 R0426-2-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Feb. 26. 1998).

Under EBR 2(L), "commercial purpose" is defined as "[t]he provision of facilities. goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee. contribution. donation or other object having value." See In re Spring Brook Farm Foundation. Inc., 164 Vt. 282 (1995)

(dormitory constructed by a non-profit corporation was construction for a commercial purpose).

As noted above in subsection D, since June 1, 1970, Mr. Peet has constructed a water diversion ditch and culvert, installed runway lights and VASI light, applied crushed stone and marble to the runway's surface, and constructed the Shop Building. Since June 1, 1970, the use of these improvements has been for, in part, commercial agricultural flight operations and aircraft maintenance services all of which have been provided to third persons in exchange for compensation. Mr. Peet's 1996 and 1997 AOT Applications, as well as the terms of the 1997 AOT Certificate, confirm that the Peet Airport has been and is used for a commercial purpose. Accordingly, an Act 250 permit was and is required for the construction and use of these improvements pursuant to 10 V.S.A. § 6001(1) and EBR 2(A)(2).

G. Issue 5: Pre-emption of Act 250 Jurisdiction

The Supremacy Clause of the United States Constitution, art. VI, cl.2, provides the basis for what is known as the "preemption doctrine." Under that doctrine, the federal government may preempt the States' authority to regulate a particular field. Preemption may be accomplished in one of three ways: (i) Congress may express, by statute, a clear intent to preempt state law; (ii) in the absence of express preemption, Congress may occupy the field of regulation so pervasively that there is no room for state action; or (iii) state law may conflict with federal law. Gustafson v. City of Lake Angelus, 76 F.3d 778, 782-83 (6th Cir.1996), cert. denied, 5 19 U.S. 823 (1996).

The federal government has preempted state regulation of certain aspects of the operations of aircraft and airports, See. e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 US. 624 (1973), but it has not so acted on land use issues such as zoning and environmental review. See. e.g., 14 C.F.R.§ 157.7(a) (the FAA's aeronautical study of an airport proposal will not consider environmental or land use compatibility impacts). While FAA Part 137 specifies certain requirements for commercial agricultural aircraft operators. there is no express or implied preemption of state regulation over such operators or flight operations. See FAA Part 137 at § 137.19.

In Gustafson, the court undertook a comprehensive review of federal aviation statutes and regulations. 76 F.3d at 783-90. The court cited a number of cases in which the FAA "has indicated that within the federal aviation framework, it does not concern itself with land or water use zoning issues." Id. at 786. Based upon its review of federal statutes and regulations, and the FAA's interpretation of those directives, the court

concluded that the City of Lake Angelus had the authority to prohibit seaplanes from operating on a city lake.

Other courts have similarly recognized States' authority to make land use decision in aviation matters. See Condor Corp. v. City of St. Paul, 912 F.2d 215,219 (8th Cir. 1990) (no conflict between a city's regulatory power over land use and the federal regulation of airspace, nor any cases recognizing such a conflict); Gateway Motels v. Municipality of Monroeville, 525 A.2d 478,481 (Pa. Cmwlth. 1987) (federal law does not preempt local zoning of airport properties); Garden State Farms, Inc. v. Bay, 390 A.2d 1177, 1181 (N.J. 1978) (state and local governmental efforts to regulate the location of helistops are not preempted by the federal government since federal regulation does not reach down to the level of location of small, relatively isolated privately owned helistops or heliports).

These cases exemplify the authority of states and municipalities to exercise their police power to make legitimate land use decisions. Review of a development under Act 250 is an exercise of the police power. 10 V.S.A. § 6086(c). It also is instructive that Vermont law long has authorized municipalities to regulate the location of airports through zoning. See 5 V.S.A. Chapter 17.

The United States Supreme Court has held that preemption "is not to be lightly presumed." Cal. Fed. Savings and Loan v. Guerra, 479 U.S. 272,281 (1987). The Court has further held that the standard for conflict between state and federal law is to demonstrate that "compliance with both federal and state regulations is a physical impossibility." Id. at 281. In the pending matter, Act 250 does not directly conflict with the purpose or policies of the federal aviation law nor has Mr. Peet persuaded the Board that it is physically impossible for him to comply with both Act 250 and federal law.

The Board is mindful that there may be areas where it and the district environmental commissions cannot impose permit conditions, City of Burbank, supra, recent Board decision illustrates this point. In Re: Burlington Broadcasters, Inc., #4C1004-EB, Findings of Fact, Conclusions of Law. and Order (January 3 1,1997), the Board found that Federal Communication Commission ("FCC") regulations preempted Act 250 regulation over issues of Radio Frequency Interference ("RFI"). The Board cited legislative history indicating that it was the intent of Congress to reserve exclusive jurisdiction for the FCC on this issue. Id. at 2. However. the Board also held that FCC regulations did not preempt Act 250 review over the environmental and health impacts of Radio Frequency Radiation ("RFR"). Applying Burlington Broadcasters, the mere existence of federal law relating to aeronautics does not divest the Board of jurisdiction. Accord In re Stokes Communications Corporation, 164 Vt.30, 37 (1995) (Board's

regulation of a broadcast tower was done with the acknowledgment that the Federal Aviation Administration could preempt a light shield permit condition). The present issue, however, is simply one of jurisdiction in general. The Board concludes that its jurisdiction is not preempted by federal law.

V. ORDER

1. The Peet Airport is not a pre-existing development pursuant to 10 V.S.A. § 6081 and EBR 2(O). Because there is no pre-existing development, there has not been a substantial change pursuant to 10 V.S.A. § 6081 and EBR 2(G).

2. The Peet Airport does not constitute the construction of improvements for farming, logging or forestry purposes below the elevation of 2,500 feet and the Peet Airport is not exempt from the requirement to obtain an Act 250 permit.

3. An Act 250 permit was and is required pursuant to 10 V.S.A. § 6001(3) and EBR 2(A) for the Peet Airport, including, but not limited to, the construction of the water diversion ditch and culvert; the installation of runway lights and VASI light; the application of crushed stone and marble to the runway's surface; the construction of the Shop Building; and the use of the Peet Airport for commercial agricultural flight operations and aircraft maintenance services.

4. If, as part of an application for an Act 250 permit, Mr. Peet discloses that he intends to (i) construct additional improvements that are for a commercial purpose, or (ii) conduct commercial flight operations in addition to commercial agricultural flight operations, then such additional construction and/or uses shall require an Act 250 permit pursuant to 10 V.S.A. § 6001(3) and EBR 2(A).

5. The requirement to obtain an Act 250 permit is not preempted under the supremacy clause of the United States Constitution. Mr. Peet may contest before the district commission and, on appeal, this Board, that certain types of permit conditions are preempted consistent with the Board's discussion above in subsection G of Section IV.

Dated at Montpelier, Vermont, this 28th day of January, 1999.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
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